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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

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No. 815

IN THE MATTER
of the

Petition of SKIBS A/S JOLUND, as owner of the M/S BLACK GULL for exoneration from or limitation of liability.

SKIBS A/S JOLUND,

*Petitioner,*

*vs.*

AMERICAN SMELTING & REFINING COMPANY, ATKINSON HASEBRICK & CO., ET AL.,

*Respondents,*

MARIA VERBEECK, ET AL.,

*Respondents.*

No. 800

IN THE MATTER
of the

Petition of SKIBS A/S JOLUND, in a cause of exoneration from or limitation of liability for damages arising out of a fire on board the BLACK GULL on July 18, 1952.

BLACK DIAMOND STEAMSHIP CORP.,

*Petitioner,*

*vs.*

AMERICAN SMELTING & REFINING COMPANY, ET AL.,

*Respondents*

BLACK DIAMOND STEAMSHIP CORP.,

*Petitioner,*

*vs*

MARIA ANGELINA VERBEECK, ET AL.,

*Respondents*

## MOTION OF KONINKLIJKE NEDERLANDSCHE REEDERSVEREENIGING (Royal Netherlands Shipowners Association) FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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# INDEX


| | PAGE |
|---|---|
| MOTION | 1 |
| BRIEF | 5 |
| JURISDICTION | 5 |
| STATUTES INVOLVED | 5 |
| INTEREST OF AMICUS CURIAE | 6 |
| QUESTION PRESENTED | 6 |
| ARGUMENT | 7 |
| I. The statutes of the United States relating to fires on vessels, and the uniform and consistent construction of such statutes by the Courts of the United States, are of vital importance to Dutch shipowners and carriers | 7 |
| II. To shift the Burden of Proof would have a serious adverse effect upon Dutch shipowners and carriers | 11 |
| III. The decision of the Court of Appeals for the Second Circuit should be reviewed by this Court at the present time | 12 |
| IV. The decision of the Court of Appeals for the Second Circuit, unless reversed by this Court, will stand as a harmful precedent regardless of the outcome of these cases on remand | 15 |
| CONCLUSION | 16 |
| CERTIFICATE OF SERVICE | 17 |

## TABLE OF CASES

PAGE

*A/S J. Ludzeig Mozeinckels Rederi* v. *Accinanto, Ltd.*, 199 F. 2d 134 (1952), cert. den'd, 345 U. S. 992 (1953) ..... 8

*Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249 (1943) 10, 11, 12

*Earle & Stoddart, Inc., et al.* v. *Ellerman's Wilson Line, Ltd.*, 287 U. S. 420 (1932) ..... 10

*Hoskyn & Co. Inc. et al* v. *Silver Line Ltd.*, 143 F. 2d 462 (1944) ..... 8

*Petition of Isbrandtsen Company*, 201 F. 2d 281 (1953) ..... 8

*The Automobile Insurance Company, et al.* v. *United Fruit Company*, 224 F. 2d 72 (1955) Cert. denied 345 U. S. 992 ..... 8, 9, 12

*The Cabo Hatteras*, 5 F. Supp. 725 (1933) ..... 8

*The Pennsylvania*, 86 U. S. 125 ..... 8, 9

## TABLE OF STATUTES CITED

Carriage of Goods by Sea Act, 46 U. S. C. Sec. 1304(2), 49 Stat. 1210(2) ..... 5

28 U. S. C. Code § 1254 ..... 5

The Fire Statute, 46 U. S. C. Sec. 182 (R. S. Sec. 4282) ..... 5

# MOTION OF KONINKLIJKE NEDERLANDSCHE REEDERSVEREENIGING

## (Royal Netherlands Shipowners Association) FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

Koninklijke Nederlandsche Reedersvereeniging (Royal Netherlands Shipowners Association) respectfully moves for leave to file a brief as *Amicus Curiae*, in support of the petitions for a writ of Certiorari to the United States Court of Appeals for the Second Circuit. The consent of counsel for the petitioners and counsel for one of the claimants has been obtained. The consent of counsel for the remaining claimants was requested but refused.

Koninklijke Nederlandsche Reedersvereeniging, as the Shipowners Association of the Kingdom of The Netherlands, is an association of Dutch shipping companies engaged in ocean commerce throughout the world. It has its home office in The Hague, The Netherlands. Its 60 members operate vessels totalling some 5,300,000 deadweight tons and include practically all the Dutch companies owning ships trading in foreign commerce, with a large number of such ships trading to and from the United States.

As more particularly set forth in the attached Brief, the statutes of the United States relating to fires on vessels are of vital importance to Dutch shipowners and carriers; and the uniform and consistent construction of such statutes by the courts of the United States is of equal importance.

In these cases the Trial Court dismissed the libels and claims because the libelants and claimants had not sustained their burden of proof with respect to the cause of a fire which occurred on board the Norwegian M/S Black Gull at sea on July 18, 1952. The Court of Appeals reversed and remanded the cases because the shipowner and carrier

had not disproved a possible but *unproved* cause of the fire. By so doing the Court of Appeals for the Second Circuit ignored prior interpretations of the statutes and shifted the Burden of Proof from the cargo and other claimants to the owner and carrier concerned.

To shift the Burden of Proof under the statutes of the United States relating to fires on vessels, from cargo and other claimants to shipowners and carriers, would have a serious adverse effect upon all shipowners and carriers, domestic as well as foreign, because they have set their rates with respect to trade with the United States on the basis that the statutes of the United States relating to fires on vessels, together with the decisions construing such statutes, relieve the owner and carrier from liability for loss or damage resulting from fire unless the cargo and other claimants prove (1) the proximate cause of the fire, and (2) that the fire was "caused by the design or neglect" of the shipowner under the Fire Statute, or that the fire was "caused by the actual fault or privity of the carrier" under the Carriage of Goods by Sea Act.

Because the petitioners in these cases are a single Norwegian shipowner and a single American carrier, they cannot speak for the great number of Dutch shipowners and carriers who are vitally concerned in the decision of the Court of Appeals, and in the adverse effect which, it is respectfully submitted, such decision will have, unless altered by this Court, upon *all* shipowners and carriers who are engaged in trade from and to the United States.

Under these circumstances, it is believed that the Brief which Koninklijke Nederlandsche Reedersvereeniging is requesting permission to file will contain a more complete argument on the issue of the construction of the statutes of the United States relating to fires on vessels, particularly with respect to the Burden of Proof in such cases, on which point there has not yet been an express ruling by this Court.

It is believed that all Shipping Interests—Shipowners, Carriers, Cargo and other Claimants, both in the United States and abroad—would share in the benefit of a review by this Court at the present time of the decision of the Court of Appeals in these cases.

Respectfully submitted,

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# BRIEF OF KONINKLIJKE NEDERLANDSCHE REEDERSVEREENIGING

**(Royal Netherlands Shipowners Association)**

## JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit, and its opinion on petitions for rehearing, are printed in the Appendices to the petitions for Writ of Certiorari and now appear in the Advance Sheets for 250 F. 2nd at page 777. The opinion of the District Court for the Southern District of New York is reported in 144 Fed. Supp. 47, and is also printed in the Appendices to the petitions.

The decree of the Court of Appeals for the Second Court was entered on November 29, 1957. Timely petitions for Rehearing in that Court were denied on January 16, 1958.

The Jurisdiction of this Court is conferred by Title 28 U. S. Code § 1254.

## STATUTES INVOLVED

The Fire Statute, 46 U. S. C. Sec. 182—"Loss by Fire. No owner of any vessel shall be liable to answer for or make good to any person any loss or damage, which may happen to any merchandise whatsoever, which shall be shipped, taken in, or put on board any such vessel, by reason or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner." (R. S. Sec. 4282).

Carriage of Goods by Sea Act, 46 U. S. C. Sec. 1304 (2). "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from * * * * (b) Fire, unless caused by the actual fault or privity of the carrier." (49 Stat. 1210(2))

## INTEREST OF AMICUS CURIAE

Koninklijke Nederlandsche Reedersvereeniging (Royal Netherlands Shipowners Association) is an Association of Dutch shipping companies engaged in ocean commerce throughout the world. Its home office is in The Hague, The Netherlands. Its 60 members operate vessels totaling some 5,300,000 deadweight tons and include practically all the Dutch companies owning ships trading in foreign commerce, a very great number of which are engaged in trade with the United States.[1]

The members of Koninklijke Nederlandsche Reedersvereeniging have a vital interest in the statutes of the United States relating to fires on vessels; and in the uniform and consistent construction of such statutes.

It is respectfully submitted, for the reasons set forth in this Brief, that *all* shipping interests—Shipowners, Carriers, Cargo and other Claimants, both in the United States and abroad—would share in the benefit of a review by this Court at this time of the decision of the Court of Appeals in these cases.

## QUESTION PRESENTED

1. May a Court of Appeals shift from cargo and other claimants to the shipowner and the carrier the burden of proof with respect to (1) the proximate cause of the fire and (2) whether the fire was "caused by the design or neglect" of the shipowner under the Fire Statute, or whether the fire was "caused by the actual fault or privity of the carrier" under the Carriage of Goods By Sea Act,

[1]Records for 1957 indicate that in that year 536 calls were made by Dutch vessels at the Port of New York, 201 at Baltimore, 183 at Hampton Roads, 102 at San Francisco, 85 at Los Angeles, 45 at Seattle, 50 at Portland, Oregon and 343 at New Orleans. We do not presently have available figures for other United States ports.

notwithstanding the fact that such statutes and their construction by the Courts in prior cases place such burden of proof upon the cargo and other claimants?

## ARGUMENT

### I

**The statutes of the United States relating to fires on vessels, and the uniform and consistent construction of such statutes by the Courts of the United States, are of vital importance to Dutch shipowners and carriers.**

Dutch shipowners and carriers have a vital interest in the statutes of the United States relating to fires on vessels, and in the construction of such statutes, because trade between The Netherlands and the United States has been developed on the basis that the shipowner and carrier is protected from liability for damage and loss by fire unless cargo and other claimants meet the Burden of Proof upon them to establish the proximate cause of the fire and that the fire was caused by personal fault of the shipowner or carrier.

The statutes of the United States relating to fires on vessels have been a vital factor in the past development of the commerce between the United States and The Netherlands, and such statutes continue as an essential factor in the maintenance of such commerce.

The Shipping Industry abroad has built up its trade with the United States in reliance upon the construction of the statutes of the United States relating to fires on vessels, under which cargo and other claimants have the burden to prove (1) the proximate cause of the fire and (2) that the fire was "caused by the design or neglect" of the shipowner under the Fire Statute, or that the fire was "caused by the actual fault or privity of the carrier" under

the Carriage of Goods By Sea Act. See *Hoskyn & Co. Inc. et al.* v. *Silver Line Ltd.*, 143 F. 2d 462 (1944); *Petition of Isbrandtsen Company*, 201 F. 2d 281 (1953); A/S *J. Ludwig Mowinckels Rederi* v. *Accinanto, Ltd.*, 199 F. 2d 134 (1952), cert. den'd, 345 U. S. 992 (1953); *The Cabo Hatteras*, 5 F. Supp. 725 (1933).

The history and purpose of these statutory enactments, with respect to the precise point herein concerned, was well summarized by the Court of Appeals for the Second Circuit (the same court concerned in these cases) in *The Automobile Insurance Company, et al* v. *United Fruit Company*, 224 F. 2d 72 (1955) Cert. denied 345 U. S. 992. In that case the Court of Appeals said (p. 75):

> "We think that congress intended as a condition for recovery for damage due to fire loss *to place the burden on cargo interests* of establishing that the fire was caused by the design or neglect of the owner." (Emphasis added)

In the *Automobile Insurance Company* case, the cargo claimants attempted to establish a presumption of fault against the vessel interests by applying the doctrine of statutory fault, established in *The Pennsylvania*, 86 U. S. 125, to proof of the cause of a fire which caused damage to the ship's cargo. The Court assumed that there was a violation of statute and that there was a violation of Coast Guard Regulations regarding the stowage of the particular commodity concerned. However, the Court rejected such effort by the cargo claimants to establish a presumption of fault on the part of the vessel interests. The Court recognized that any such effort would adversely affect the very interests which the statute was designed to protect, and held that the cargo claimants were *not* entitled to the benefit of any such presumption. On this point the Court said (p. 75):

> "We are unwilling to allow a presumption supplied by the doctrine of statutory fault to substitute

> for proof of cause required by statute. To do so would at times result in *shifting the burden of proof to the owner of a vessel by requiring him to show freedom from fault.* This we believe, would undermine the very purpose of the statutory exemption." (Emphasis ours)

*The Automobile Insurance Company* case holds that the Rule of *The Pennsylvania* does not apply to fire cases, and that a violation of an *actual* statute or regulation does not give rise to a presumption of fault. But the Court of Appeals in the present cases, ignoring its own precedent, would go even further than the Rule of *The Pennsylvania*, and would give to a proposed or draft regulation a force and effect which not even an actual statute or regulation can have in a fire case.

Koninklijke Nederlandsche Reedersvereeniging confirms that no Dutch regulations regarding the carriage of naphthalene were in force at the time of the fire.

The facts regarding the proposed or draft regulation are set forth in the petitions herein, together with facts regarding the practice over a long period of years during which vessels have been loaded in Dutch ports with deck loads of naphthalene uncovered, in the same manner as the loading of the Black Gull. It is apparent that the proposed or draft regulation was not "an accepted standard of care".

Although, as set forth herein, prior decisions in circuit and lower courts have held, and leading authorities agree, that the burden is on claimants and libelants to establish the proximate cause of the fire and to prove that the fire was "caused by the design or neglect" of the shipowner under the Fire Statute, or that the fire was "caused by the actual fault or privity of the carrier" under the Carriage of Goods By Sea Act this Court has not yet ruled expressly on the burden of proving "design or neglect" or "fault or privity."

*Earle & Stoddart, Inc., et al.*, v. *Ellerman's Wilson Line Ltd.*, 287 U. S. 420 (1932), and *Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249 (1943), are leading decisions in which this Court upheld the Fire Statute. In the latter case this Court, addressing itself to the question as to whether the Fire Statute extinguished maritime liens for cargo damage, held that the statute immunized the owner completely and that "Congress has, with the exception stated in the Act, extinguished fire claims as an incident of contracts of carriage" (p. 254). Mr. Justice Jackson includes in his opinion a most interesting and helpful analysis of the history and practical results of the Fire Statute (pp. 254-256).

While the United States Fire Statute was designed "to enable our merchant marine to compete" on an equal basis with foreign shipowners (*Consumers Import Co., et al.* v. *Kabushiki Kaisha Kawasaki Zosenjo, et al.*, 320 U. S. 249, 254), it, together with the almost universal adoption of the Hague Rules in various national Carriage of Goods By Sea Acts,[2] has had the desirable effect of uniformity in rate structures. "It enabled the carrier to compete by offering a carriage rate that paid for carriage only, without loading it for fire liability. The shipper was free to carry his own fire risk, but if he did not care to do so it was well known that those who made a business of risk-taking would issue him a separate contract of fire insurance." *Consumers Import Co., et al.* v. *Kabushiki Kaisha Zosenjo, et al., supra*, at p. 255.

Until the United States Court of Appeals for the Second Circuit rendered its decision in these cases, the universal view was that under the Fire Statute and under the

[2]The United States Carriage of Goods by Sea Act is based upon the "Hague Rules" contained in the Brussels Bill of Lading Convention of 1924. In addition to the United States some 23 nations, including The Netherlands, have adopted the Hague Rules or enacted legislation to the same effect.

Carriage of Goods by Sea Act, the cargo and other claimants have the burden to prove (1) the proximate cause of the fire, and (2) that the fire was "caused by the design or neglect" of the shipowner under the Fire Statute, or that the fire was "caused by the actual fault or privity of the carrier" under the Carriage of Goods By Sea Act.

Poor on Charter Parties (Fourth Edition) states unequivocally "When a loss by fire is established, the burden of proving 'actual fault or privity' or 'design or neglect' falls upon cargo interests, and proof of unseaworthiness and lack of due diligence, without more, does not deprive the carrier of the statutory exemption" (page 177). Knauth on Ocean Bills of Lading (Fourth Edition) says "The burden of proving 'design or neglect' or 'actual fault or privity' remains upon the party libellant" (page 214).

## II

**To shift the Burden of Proof would have a serious adverse effect upon Dutch Shipowners and Carriers.**

If the Burden of Proof, long established as being upon cargo and other claimants, were to be shifted to shipowners and carriers, it would have a serious adverse effect upon Dutch shipowners and carriers.

Rates for ocean carriage would no longer be on the basis of "carriage only", but they would have to be "loaded" for fire liability, thus bringing back the undesirable practices and conditions discussed in the *Consumers Import Co.* case, *supra*.

The protection given to shipowners and carriers under the United States statutes, would be destroyed by shifting the Burden of Proof. Such destruction would greatly hinder and retard the Dutch shipowners and carriers in their trade to United States ports, by reason of the un-

certainties which would result from the loss of the present uniform basis for ocean freight rates, and by the increased costs of the shipowner and carrier being forced to provide fire insurance as well as ocean carriage.

Fire claims "as an incident of contracts of carriage" would no longer be "extinguished" as Congress intended (*Consumers Import Co.* case, *supra*), but would be revived by such a shift of the Burden of Proof.

## III

**The decision of the Court of Appeals for the Second Circuit should be reviewed by this Court at the present time.**

It is respectfully submitted that in its decision in these cases, the United States Court of Appeals for the Second Circuit has now done that which it was careful in the *Automobile Insurance Company* case to *avoid* doing—the Court in the present cases has shifted "the burden of proof to the owner of a vessel by requiring him to show freedom from fault."

The decision of the Court of Appeals would remand the present cases back to the Trial Court for further findings on the issues: (1) Was it negligent to fail to cover the cargo from the sun? (2) If so, was the negligence the cause of the damage?

The shipowner and carrier would be required to *disprove* any such negligence *even before* the second issue, as specified by the Court of Appeals, would be reached—i.e. "If so, was the negligence the cause of the damage?" Here again, the burden would be shifted to the shipowner and carrier to *disprove* a causal connection between any alleged but unproved negligence and the damage.

The burden thus imposed upon the shipowner and carrier by the decision of the Court of Appeals is a most

serious departure from the long established Rule—i.e. that the cargo and other claimants must prove (1) the proximate cause of the fire, and (2) that the fire was "caused by the design or neglect" of the Shipowner under the Fire Statute, or that the fire was "caused by the actual fault or privity of the carrier" under the Carriage of Goods by Sea Act.

The issue which first arises in a fire case is what was the proximate *cause* of the fire? Only when the cargo and other claimants have met their burden of proving the *cause* of the fire, does the second issue arise—was the fire caused by personal fault on the part of the shipowner or carrier?

The departure made by the Court of Appeals is vividly illustrated by the following passage in the Court of Appeals' decision denying the petitions for rehearing:

> "Libelants contended that the napthalene might have been protected by covering with tarpaulin. Petitioners concede that the regulations say 'hazardous articles *may* be protected by the use of a tarpaulin'. The Judge's findings was that the napthalene *could not possibly* have been protected by such means. It is with this that we have mainly found fault."

The issue is not whether the naphthalene *could possibly have been protected by tarpaulins*, as the Court of Appeals appears to have believed was the issue. The Court "mainly found fault" with the Trial Judge because the Court of Appeals understood that the Trial Judge had found that "the naphthalene *could not possibly* have been protected by such means." No such finding was made by the Trial Judge.

The findings made by the Trial Judge, and to which the Court of Appeals referred as the "key findings as to lack of causation" are Findings 29 and 35 as follows:

> "29. The sun's rays could not have caused or contributed to the *cause of the fire*". (Emphasis added)
>
> "35. The failure to cover the bags of naphthalene on the 'Black Gull' with a tarpaulin was not and could not have been a contributing *cause of the fire*". (Emphasis added)

It is respectfully submitted that the Trial Judge decided the *correct* issue—namely, was the absence of tarpaulins *the cause* of the fire?

The Trial Judge's Findings Nos. 31 and 32 are set out in footnote 1 to the decision of the Court of Appeals, and they show that the Trial Judge found that, on all the evidence, the use of a tarpaulin "*would not* have prevented the fire on the 'Black Gull' " (Finding No. 31); and "*would not* have afforded protection from ignition due to creosote oil or gases" (Finding No. 32) (Emphasis added).

The Trial Judge's last finding on the subject of a tarpaulin coverage was:

> "36. Even if it be assumed that failure to cover the stow of bagged naphthalene with a tarpaulin was either negligence or in violation of controlling statute or regulation, *libelants have not proved that that failure was a proximate cause of the fire.*" (Emphasis added).

We have gone into some detail in the foregoing discussion not because *Amicus Curiae* would seek to intervene on any question concerning the facts or the merits of these cases, but to illustrate and emphasize the *departure* which is made in the decision of the Court of Appeals from the established Rule as to the Burden of Proof in fire cases.

## IV

**The decision of the Court of Appeals for the Second Circuit, unless reversed by this Court, will stand as a harmful precedent regardless of the outcome of these cases on remand.**

Even if the final result in the Trial Court, upon remand of these cases in accordance with the decision of the Court of Appeals, were to be exoneration of the shipowner and carrier, the decision of the Court of Appeals, unless altered by this Court, will have a harmful effect on Dutch and all other shipowners and carriers, both United States and foreign flag, which are engaged in the import or export commerce of the United States. The Court of Appeals held the Trial Court in error for dismissing the claims simply because the owner and carrier had not disproved *unproved* allegations of causation. This is contrary to all principles of tort law as well as inconsistent with the text, spirit and purpose of the Fire Statute and the Carriage of Goods by Sea Act.

The decision of the Court of Appeals, unless altered by this Court, will stand as a precedent with respect to the Burden of Proof in cases concerning fires in ships, and thus will adversely affect the interests of the members of Koninklijke Nederlandsche Reedersvereeniging, as well as shipowners and carriers generally.

It is the issue as to Burden of Proof under the Fire Statute and under the Carriage of Goods by Sea Act in which the members of Koninklijke Nederlandsche Reedersvereeniging, and other shipowners and carriers, are vitally concerned. That issue can be settled only by this Court now reviewing the decision of the Court of Appeals.

## CONCLUSION

**Wherefore, Koninklijke Nederlandsche Reedersvereeniging as *Amicus Curiae* respectfully urges that the Petitions for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.**

Respectfully submitted,

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CER E ACE

I, CHARLES . . HAIGHT, Counsel for KONINKLIJKE NEDERLANDSCHE REEDERSVEREENIGING (Royal Netherlands Shipowners Association) *Amicus Curiae*, and a member of the Ba. of the Supreme Court of the United States, hereby certify that on the 14th day of March, 1958, I served a copy of the foregoing Motion and Brief on each of the attorneys named below by mailing the same to them in duly addressed envelopes, with first class postage prepaid, at their respective addresses stated below, said attorneys being Counsel for all of the parties in the captioned proceedings:

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